Comments
on behalf of the
Institute of Scrap Recycling Industries
(ISRI)

U.S. EPA
Superfund Recycling Equity Act
Stakeholders Public Meeting

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Institute of Scrap Recycling Industries, Inc.
THE ORIGINAL RECYCLERS®

U.S. EPA Stakeholders Public Meeting
Comments on Behalf of the Institute of Scrap Recycling Industries (ISRI)

The Institute of Scrap Recycling Industries, Inc. ("ISRI") is pleased to submit comments on what constitutes 'reasonable care' as contemplated by sections 127(c)(5)(6) of the Superfund Recycling Equity Act (herein after referred to as "SREA" or the "Act").

ISRI is the trade association of the scrap processing and recycling industry, representing approximately 1,400 companies throughout the country that process, broker, and/or consume commodities - including ferrous and nonferrous metals, paper, glass, textiles, rubber and plastics. The domestic scrap recycling is an integral part of this nation's efforts to recycle valuable commodities, conserve its natural resources, and make better use of its diminishing landfill capacity. For over a century, the scrap recycling industry has provided a valuable service to consumers, manufacturers, and governments.

The American scrap recycling industry's products are worth at least $20 billion a year. The industry handles over 125 million tons of recyclables annually, including approximately 10 to 12 million obsolete motor vehicles and over 40 million appliances. Scrap processors annually recycle more than 60 million tons of iron and steel; 7.7 million tons of non-ferrous metal; 47 million tons of paper and paperboard; 3 million tons of glass (cullet); and 470,000 tons of plastics. These figures represent materials that were diverted or removed from the solid waste stream for beneficial reuse, conserving impressive amounts of energy and natural resources in the recycling process. For example, according to the Environmental Protection Agency (EPA), recycled aluminum saves the nation 95 percent of the energy that would have been needed to make new aluminum from ore. Recycled iron and steel result in energy savings of 74 percent; recycled copper, 85 percent; recycled paper, 64 percent; and recycled plastic, more than 80 percent.

Most ISRI members are small family-owned businesses, including a significant number that have been in continuous operation for 100 years or more. For example, over 50% of ISRI's active membership consists of companies with $5 million or less in annual gross sales. In addition, the majority of scrap recyclers employ 25 or fewer employees.

1.01 INTRODUCTION

1.1 Background

Prior to the passage of SREA, a misinterpretation of Superfund's liability provisions did great harm to recycling. Federal courts previously imposed Superfund liability on persons who sold recyclable materials that had been diverted from the waste stream for recycling. Their rulings were the result of an overly broad interpretation of the law's provisions, which imposed liability on those who "arrange for disposal" of waste. Unfortunately, these courts presumed that any transaction in material that was no longer useful in its current form was a waste disposal transaction.

Recycling, however, is distinct from, and in practice the opposite of, disposal. Recycling involves the processing of material for the manufacture of a new product. This is in direct contrast to disposal activities which terminate the life cycle of a material and the Resource Conservation and Recovery Act (RCRA) mandate to recover/reuse materials from a potential waste stream and to conserve valuable resources.

The unintended consequence of Superfund created a market distortion preferring virgin feedstocks over recycled feedstocks. At a site contaminated by a third party who used both virgin and recycled materials, the suppliers of the recycled materials were held liable for clean-up while the suppliers of the virgin materials were not. This occurred because the sale of a virgin material was not considered to be waste disposal and thus not subject to Superfund liability. In fact, even if a manufacturer used both virgin and recycled materials and contaminated its site with substances that could only have come from the virgin material, the supplier of the recycled materials was still held liable and the supplier of virgin materials was not.

In 1993, the recycling industry reached agreement with all relevant stakeholders that this prior interpretation of Superfund created a significant disincentive to recycling. As a result, that same year, the Clinton Administration (including the Environmental Protection Agency and Department of Justice), leading environmental groups (Sierra Club, National Wildlife Federation, Environmental Defense Fund, the Natural Resources Defense Council and Friends of the Earth) and ISRI agreed to clarifying legislative language that later became the SREA. The SREA made it clear that the sale of material for recycling is not the same as the arrangement for treatment or disposal of a hazardous substance and thus does not subject the seller to Superfund liability. It in no way affects liability for contamination a recycler may cause at his own facility, as well as that caused by waste for which the recycler arranges disposal.

Without action by Congress, this ‘third party’ Superfund liability threatened the existence of many small, family-owned businesses and served as a significant impediment to financing new entrants to the recycling industry as well as successful existing recycling firms seeking to adapt to a changing economy. Because Superfund liability applies both prospectively and retroactively, simple repeal of retroactive liability would not have been sufficient to remove the impediments to recycling. The passage of the Superfund Recycling Equity Act of 1999 was imperative for the future of recycling.

Importantly, the language agreed to in 1993 (and that later became SREA) contained several provisions designed specifically to help promote the shipment of recyclable materials to environmentally responsible facilities. It is these provisions – most notably the reasonable care standard – that are at issue here today. In drafting these provisions, there was also concern on the part of the stakeholders for not creating a system to determine reasonable care that would be unduly burdensome to recyclers and impractical to implement.

1.2 Purposes of the SREA

Congress enacted the Superfund Recycling Equity Act on November 19, 1999 as part of HR 3194, the 2000 Consolidated Appropriations Act, and the Act was signed into law by President Clinton on November 29, 2000 [PL 106-113]. The passage of the Act represented the culmination of six years of effort to address the impact of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and its liability provision on those engaged in recycling.

The Act and the legislative history recognizes that recycling is an activity distinct from disposal or treatment, thus sending material for recycling is not the same as arranging for disposal or treatment and recyclable materials are not a waste***. Specifically, the Act recognizes that recyclers are selling a product and not disposing of a waste.***

The law specifically states that the purpose of SREA is to: "1) promote the reuse and recycling of scrap material in furtherance of the goals of waste minimization and natural resource conservation while protecting human health and the environment; 2) to create greater equity in the statutory treatment of recycled versus virgin materials; and 3) to remove the disincentives and impediments to recycling created as an unintended consequence of the 1980 Superfund liability provisions."

In the Senate, the Act was championed by Majority Leader Trent Lott (R-MS) and Minority Leader Tom Daschle (D-SD) as well as Senator Blanche Lambert Lincoln (D-AR), Senator John Warner (R-VA), Senator Max Baucus (D-MT), and the late Senator John Chafee (R-RI) and had the support of two-thirds of the full Senate. (Similar legislation considered in 1998 had the support of more than 300 Members of the House of Representatives.)

Immediately upon passage by the Senate, Senator Lott introduced legislative history for SREA into the Congressional Record in order to confirm the congressional intent and statutory purposes and goals of the law. (145 CR S15048).

Senator Lincoln also introduced remarks on the day of passage in which the Senator stated "the Superfund Recycling Equity Act of 1999 will finally place traditional recyclable materials which are used as feedstocks in the manufacturing process on an equal footing with the virgin, or primary feedstock counterparts." Senator Lincoln continued, "[recyclers] will be treated as if they were selling a product, which is the same standard to which suppliers of virgin material are held." (145 CR S15028)

The authority and weight of these remarks have recently been acknowledged by a Federal District Court. Judge Oliver Wanger of the U.S. District Court for the Eastern District of California recently ruled in favor of a number of scrap recyclers, including several ISRI members, involved in the case of *Department of Toxic Substances Control v. Interstate Non-Ferrous Corporation, et al.,* (often referred to as the Mobile Smelting case). Judge Wanger ruled "the remarks of Senator Lott, the primary sponsor cannot be ignored." The Judge stated, "legislative statements can be helpful to determine statutory meaning and Congressional intent."

The 'plain language' of the Act and the Act's legislative history, support the statement by Judge Wanger that "the most reasonable interpretation from the statute's language, context, and legislative history is that Congress meant to clarify not change, eliminate ambiguity and conflict and bring uniformity and certainty to recycler liability under CERCLA".

1.3 Overview of the SREA

In keeping with the intent of the stakeholders, which as stated above included EPA, was to create a "reasonable, workable, environmental [law][1]". The Act provides a reasonable and workable mechanism to enable recyclers to demonstrate that they are arranging for recycling and not arranging for disposal.

According to SREA, a recycler of recyclable materials qualifies for liability exemptions when it can demonstrate by the preponderance of the evidence and at the time of the transaction that certain criteria are met. The preponderance standard is a relatively low standard that merely means that it is more probable than not that the criteria were met as compared to the higher standard of "beyond a reasonable doubt." Further, the "preponderance standard" must only be met at the time of the transaction, not at some later date. This is typical of contract law and is supported by the Act's legislative history, which states that reasonable care is to be determined "at the time when the buyer and seller reach a meeting of the minds."

While the specifics may vary depending on when the transaction took place and the specific recyclable material involved, there are three basic conditions that a recycler must meet to benefit from the new law:

1. *Does the material meet the definition of a 'recyclable material'?*

2. *Does the transaction meet the conditions for 'Arranging for Recycling'?*

3. *For transactions after February 27, 2000, did the recycler take reasonable care to evaluate the consuming facility's environmental compliance record with respect to substantive provisions of federal, state or local environmental laws and regulations applicable to the management of the recyclable material?*

[1] (145 CR S15051)

2.0 REASONABLE CARE PRINCIPLES [127(C)(5) & (6)]

ISRI appreciates the Agency's effort to frame the dialogue and information exchange by posing several specific questions. However, instead of responding to each question individually, ISRI has taken this opportunity to address the 'reasonable care standard' in totality. Taking into consideration the plain language of the law, which clearly acknowledges that recycling transactions are a sale of a product and not a waste disposal transaction, combined with the intent and guidance provided by the legislative history, ISRI believes that the determination of 'reasonable care' should be guided by the following principles:

1.1 Guiding Principles & §127(c)(6) Criteria

- While the statute does not define *per se* what "reasonable care" means, [2] in general, ISRI believes that "reasonable care" should be defined in light of the skill and knowledge commonly possessed at the time and place by a prudent person in the management of his/her business affairs in order to avoid injury to their business or their property, or the persons or property of another.

- The size of an individual facility is another important factor in the facility's ability to detect the nature of the consuming facility's operations. As market share, resources, business relationships, and even geographical location may be factors in a facility's ability to detect and conduct reasonable care, flexibility must be afforded when assessing the ability of a recycler - especially a smaller sized one - to determine information about the consuming facility.

- Both the statute and legislative history do not require that the seller make a determination in fact that the buyer is fully compliant, but rather that the seller make reasonable inquiries and reasonably assess the results of those inquiries. *See* 145 Cong. Rec. S15,048 (Nov. 19, 1999).

- Standard industrial practices and prior business relationships are factors that make up the reasonable care standard. Common industrial standards historically have been used as benchmarks for determining the reasonableness of industrial activities, and numerous industrial codes have been developed to guide industrial practices as a basis for determining reasonable care. They should be factors that help to analyze the price paid and the ability of the recycler to detect the nature of the consuming facility's operations.

- The price paid in the recycling transaction §127(c)(6)(a) is intended to put the recycler on notice of any possible "sham" recycling. If the price is significantly different than one might expect, the recycler should investigate further whether the consumer is in

[2] In fact, our search of federal statutes did not discover any attempts to define "reasonable care" despite its frequent use. The most thorough analysis of "reasonable care" in any federal regulation is a Department of Treasury "Reasonable Care Checklist" to help importers meet the "reasonable care" requirements of U.S. Customs laws. *See* 62 Fed. Reg. 64,248 (Dec. 4, 1997).

substantive compliance with environmental laws. Assuming a "typical" price is paid for the recyclable material, this criterion is satisfied.

- The ability of the person to detect the nature of the consuming facility's operations §127(c)(6)(b) and the result of inquiries made to appropriate regulatory agencies §127(c)(6)(c) – create further bases for determining "reasonable care" under the Act and they should be read together. If the recycler has the ability to determine that the consumer's operations are in compliance, then making any inquiry to any regulatory body would be superfluous and duplicative. That is the purpose behind the language "result of inquiries" because there is no mandate to make inquiries, only a mandate to consider them if they are necessary. At the other end of the spectrum, an inability to make any assessment of the consumer's operations would necessitate that other actions are taken to ensure "reasonable care" including making inquiries to federal, state, or local agencies. Thus, the second and third criteria work together to ensure "reasonable care," recognizing that in some circumstances complete reliance on one or the other is appropriate.

- Making inquiries to the appropriate federal, state, or local authority §127(c)(6)(c) only provides benefits when no response is forthcoming from the consuming facility. If a consuming facility provides a positive compliance response to the seller, there should not be any need to make any further inquiry at the appropriate authority.

7.1 Exercising Reasonable Care – Scope of Evaluation

- A recycler's exercise of reasonable care in determining that the consuming facility is in compliance with applicable regulatory requirements is limited to those activities that occur prior to the recyclable material entering the consuming facility's production process. Once the recyclable material enters the consuming facility's production process, the consuming facility is no longer managing the material as an in-feed material but has begun the production of the consuming facility's product. According to the Act's legislative history: 1) a recycler must only determine the status of the consuming facility's compliance with laws, regulations, or orders which *directly apply* to the handling, processing, reclamation, storage or other management activity associated with the recyclable materials sent by the person and, 2) a recycler is not responsible for determining the consuming facility's compliance with regulations governing the consuming facility's production of its product, only its management of a recyclable as in-feed material. Thus, a recycler is not required to determine the consuming facility's compliance status beyond the point where the consuming facility begins to change the form of the recyclable material (i.e., melting, pulping, physical manipulation, etc.). A more broad compliance review is beyond the intent of the Act, and is not germane to the issue of reasonable care with regard to the sale of a product.

- In evaluating which *substantive* provisions of environmental compliance requirements are applicable to the demonstration, the regulatory status of the recyclable material should be considered. For example, under RCRA, scrap metal is excluded from the

definition of solid waste when shipped for recycling. Thus for a scrap metal transaction, it would be illogical to evaluate a consuming facility's compliance with federal RCRA regulations as RCRA does not apply. The legislative history has acknowledged that record keeping errors, missed deadlines, or similar infractions by the consuming facility, which are out of the control of the person arranging for recycling, are procedural matters and therefore not applicable to the recycler's evaluation.

- The recycler is not precluded from demonstrating it took reasonable care by evaluating information obtained directly by the consuming facility and subsequently provided to the recycler. For example, if a consuming facility is certified by an environmental management system auditing program (such as ISO 14000), participated in a U.S. EPA or state audit program, or used a commercial service that verifies a facility's compliance status, the recycler may use this shared information to determine the compliance status of the consuming facility. Since these programs include a process to verify compliance with environmental regulations, making further inquiries would be unreasonable and is unnecessary. Furthermore, if a consumer has made its own inquiries to the primary regulatory authorities regarding its environmental compliance status and elects to share this information with its suppliers (i.e. the recycler), the recycler should be able to use the 'result of these inquiries' to demonstrate it has exercised 'reasonable care'. No further inquiries should be necessary. This is consistent with the ASTM Phase I Site Assessment Standard which allows the environmental professional to consider information obtained by others.

- In the case where the recycler must evaluate the 'results of inquiries made to the appropriate regulatory authority', the Act only requires a person to make reasonable inquires; inquiries need not be made before every transaction. Furthermore, such inquiries need only be made to those agencies having *primary* responsibility over environmental matters related to the handling, processing etc. of the recyclable materials involved in the recycling transaction. For example, if a State environmental agency has been delegated the authority to issue storm water permits, there should be no need to evaluate federal or local standards as this is the agency that is primarily responsible for the management of the consuming facility's storm water permit. There is no obligation to directly contact the relevant regulatory authority. A recycler may utilize public and private databases, consultants, or other tools to demonstrate it has taken reasonable care. This principle is consistent with the ASTM standard practice for Phase I Environmental Site Assessments as well. ISRI is investigating the merits of establishing a database to directly assist recyclers with this task.

- The recycler is only in a position to determine a consuming facility's known compliance history, not unreported activities or pending/undisclosed regulatory actions by the primary regulatory activity. These additional activities are beyond the recycler's ability to detect the nature of the consuming facility's management activities associated with the recyclable material and thus outside the intent and scope of the Act.

- The recycler should only be responsible to inquire into the compliance status of the party he or she arranged the transaction with, not subsequent parties.

3.1 Exercising Reasonable Care – Ability to Detect

- If the recycler should contact the primary regulatory agency directly, requests for information should be addressed in a reasonable period. For example, if a recycler directly contacts the primary regulatory agency and does not receive a reply within 20 calendar days, the recycler should be able to assume that the consuming facility is in compliance with substantive provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the management of the recyclable material. This position is consistent with the current industry standard for ASTM Phase I Site Assessments, where records need only be reviewed if they are reasonably ascertainable. Furthermore, as long as the recycler has reasonably attempted to ascertain on his or her own the nature of the consuming facility and, absent a sufficient response, taken other actions, including contacting regulatory bodies, to ascertain necessary compliance information, he has acted reasonably.

- If a recycler arranges for recycling of a recyclable material through a broker, the recycler should be able to demonstrate that it took reasonable care by considering the documentation or information the broker has made available about the consuming facility that received the recycler's recyclable material. This principle does not shift the responsibility of reasonable care from the recycler to the broker; instead it enables a recycler to take advantage of compliance information made available by a broker. If the recycler is involved in a blind transaction with a broker (i.e., the recycler does not know which consuming facility the recyclable material is being sent to), the recycler should be able to demonstrate that it has taken 'reasonable care' by evaluating documentation or acknowledgments from the broker that it has taken the necessary steps to evaluate the environmental compliance of the consuming facility.

- The Act does not require site visits to demonstrate 'reasonable care'. Recyclers should be able to rely upon the good faith assertions and actions of the consuming facility or appropriate inquiries of regulatory authorities to establish reasonable care. Mandatory site visits can be intrusive and subject the seller to liability for assessing compliance responsibilities of another company's facility and operations. If, in the scope of the business relationship, a recycler visits a consuming facility and unequivocally identifies a compliance problem, then the seller may be on notice to seek reassurances prior to any future transactions. Likewise, if a recycler conducts a site visit as a general business practice, including an evaluation of environmental compliance during such site visit can be used to demonstrate that the recycler took 'reasonable care'.

- Whether a recycler has exercised reasonable care should be determined at the time of the transaction (i.e. at the time when the buyer and seller reach a meeting of the minds). To require an evaluation of every transaction would be burdensome and impractical and beyond the scope and intent of the Act. There are instances when a reasonable person may not have to seek further reassurances after a reasonable care determination has been made at the beginning of the business relationship. If the consuming facility confirms that it currently is in compliance and pledges to provide notification of any future compliance problems, it is reasonable to assume that a lack of such notification is

reasonable proof of a lack of compliance problems. Even if the consuming facility does not provide the applicable information to make a reasonable case determination, periodic checks of regulatory authorities, compliance databases, and reminder notices to the consuming facility should provide adequate frequency to show that the seller is exercising reasonable care. Any more frequent requirement would be too burdensome to all parties involved. This is consistent with EPA's recommendations in its auditing policy regarding the performance of facility audits. *See* EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements, 51 Fed. Reg. 25,004 (July 9, 1986)(requiring audits "not less often than annually" after an initial audit).

3.0 CONCLUSION

ISRI appreciates the opportunity to submit comments to the Agency on this very important issue. We are happy to work with the Agency should it decide to develop guidance on "reasonable care."